

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-2226-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DONALD R. GOLDSWORTHY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marquette County:
LEWIS W. CHARLES, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Donald Goldsworthy appeals from an order denying postconviction relief stemming from a judgment convicting him of possessing marijuana with intent to deliver it. The dispositive issue is whether the trial court properly terminated the postconviction proceeding without allowing Goldsworthy the opportunity to present evidence. We conclude that the trial court

exceeded its authority in doing so. We therefore reverse the order denying postconviction relief and remand for further proceedings on Goldsworthy's postconviction motion.¹

On May 28, 1994, police officers obtained a search warrant, entered Goldsworthy's home, and seized the evidence that resulted in this prosecution. Goldsworthy moved to suppress that evidence and, at a suppression hearing, introduced testimony that officers actually entered his home and conducted the search hours before they obtained the warrant. However, Goldsworthy was not allowed to present additional testimony on this point from Michael Smith, a mutual friend of Goldsworthy and the police chief of Montello, Mark Mueller. Had he testified, Smith would have stated that Mueller described the search to him in a conversation that occurred several hours before the warrant was signed. After the trial court excluded Smith's testimony as inadmissible hearsay, counsel dropped the issue even though the court permitted Goldsworthy to call Mueller to testify, and then recall Smith to impeach him if he denied the conversation. The trial court subsequently found Goldsworthy's other testimony not credible and denied the suppression motion. Goldsworthy then entered a no contest plea.

Postconviction counsel filed a motion to vacate the conviction and allow Goldsworthy to retry the suppression issue with testimony from Smith, Mueller and another eyewitness to the search, on the grounds that trial counsel was ineffective for failing to present those witnesses' testimony at the suppression hearing.

¹ Because we conclude that Goldsworthy has not yet presented his evidence in the postconviction hearing, we do not address the judgment, leaving him the opportunity to appeal at a later date depending on the outcome of his motion for postconviction relief before the trial court.

On its own motion, the trial court convened a hearing for the purpose of taking Mueller's testimony. At that hearing, Mueller confirmed that he spoke to Smith on May 28, and that he mentioned Goldsworthy. He also confirmed that he was at Goldsworthy's home on the morning of May 28 to conduct certain pre-search preparations. However, he denied discussing the search with Smith. Without taking any further testimony, the court ruled:

If Mr. Smith had been allowed, ... he would have testified, I'm sure, in accordance with [defense counsel's] offer of proof today.

Then we would have had the chief of police testify; and of course, the Chief's testimony did not surprise me that no, he did not discuss with Mr. Smith the search of Mr. Goldsworthy's property.

....

It's ... preposterous that the Chief of Police of Montello would tell a friend of his, and also a friend of ... Mr. Goldsworthy, in a public area, in front of Mr. Smith and, apparently, Mr. Smith's wife, as I understand the Chief's testimony, that a search was going to be conducted or had been conducted of Mr. Goldsworthy's property....

And, ... we would have had an issue of credibility. Who should I believe; Mr. Smith or the Chief of Police of Montello?

It's a given that I would certainly hold [the chief] more credible

....

So, again, I will deny the motion to reopen the suppression hearing

(Emphasis added.) No further postconviction proceedings occurred, and the trial court entered an order denying the postconviction motion.

Due process requires that all individuals have a fair opportunity to present reasonably based claims. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984). Here, the trial court effectively deprived Goldsworthy of that right by prematurely declaring his principal witness incredible before he testified on a material factual issue, and by then terminating the proceeding on the basis of that credibility finding.² Apart from due process considerations, the determination of Smith's credibility before he testified was an erroneous exercise of discretion.

We therefore reverse the order denying postconviction relief and remand for an evidentiary hearing on Goldsworthy's postconviction motion to permit all witnesses to be heard.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

² We recognize that a motion claiming ineffective assistance of counsel does not automatically trigger the right to a hearing. A hearing is held only if the motion contains enough facts to lead the trial court to conclude that one is necessary. *State v. Washington*, 176 Wis.2d 205, 216, 500 N.W.2d 331, 336 (Ct. App. 1993). Here, the trial court did so conclude, and therefore assumed the obligation to afford due process in the subsequent proceedings.

